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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-345

QUINAULT PACIFIC CORPORATION;
INTERNATIONAL PAPER COMPANY;
W. KENT BISHOP;
WHITE LUMBER SALES, INC.;
AND GOLD REY FOREST PRODUCTS, INC.,
Petitioners,

versus

AETNA BUSINESS CREDIT, INC.;
JOHN C. PENNINGTON, TRUSTEE;
AND FREEMAN & HAWKINS,
Respondents.

BRIEF OF RESPONDENT AETNA BUSINESS CREDIT, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. WILLIAM IDE, III
Kutak Rock & Huie
1200 Standard Federal
Savings Building
Atlanta, Georgia 30303
(404) 522-8700
Counsel of Record for Respondent Aetna Business Credit, Inc.

C. EDWARD DOBBS
Kutak Rock & Huie
1200 Standard Federal
Savings Building
Atlanta, Georgia 30303
(404) 522-8700
Counsel for Respondent Aetna Business Credit, Inc.

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	2
Statement of the Case	2
Reasons for Denying Writ	5
Conclusion	11
Affidavit of Service	12

TABLE OF AUTHORITIES

Acevedo v. Immigration and Naturalization Service,
538 F.2d 918 (2d Cir. 1976) 7

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240 (1975) 5

Browing Debenture Holder's Committee v. DASA Corp.,
560 F.2d 1078 (2d Cir. 1977) 6

Carter v. Noble,
526 F.2d 677 (5th Cir. 1976) 7

F. D. Rich Co., Inc. v. United States,
417 U.S. 116 (1974) 6

Hall v. Cole,
412 U.S. 1 (1973) 6

In re A. G. Love,
577 F.2d 344 (5th Cir. 1978) 6

In re Boston & Providence Railroad Corp.,
501 F.2d 545 (1st Cir. 1974) 7

In re Midland United Co.,
141 F.2d 692 (3d Cir. 1944) 7

In re Newport Harbor Associates,
589 F.2d 20 (1st Cir. 1978) 7

In re Swartz,
130 F.2d 229 (7th Cir. 1942) 7

In re Truman Bright,
3 Bankr. Ct. Dec. 881 (E. D. Pa. 1977)
(King, B. J.) 7

Kinnear-Weed Corp. v. Humble Oil & Refining Co.,
441 F.2d 631 (5th Cir.), *cert. denied* 404 U.S.
941, *reh. denied* 404 U.S. 996 (1971) 6

Nemeroff v. Abelson,
620 F.2d 339 (2d Cir. 1980) .....

Richardson v. Communications Workers of America,
530 F.2d 126 (8th Cir. 1976) 7

Roadway Express, Inc. v. Piper,
65 L. Ed. 2d 488 (1980) 6

Suel v. Addington,
465 F.2d 889 (9th Cir. 1972) 6

United States v. Mitchell,
377 F. Supp. 1312 (D.D.C. 1974), *aff'd* 559
F.2d 31 (D.C. Cir. 1976), *cert. denied*
431 U.S. 933 (1977) 9

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OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1980. *See* Petitioners' Joint Appendix at 163. That Judgment affirmed the opinion of the United States District for the Northern District of Georgia, Atlanta Division, which is unreported. The District Court's opinion had affirmed an order of the United States Bankruptcy Court, dated June 6, 1978.

QUESTION PRESENTED

Whether, based upon a review of the record in this case, the lower courts abused their discretion in awarding to Respondent Aetna Business Credit, Inc. legal fees incurred by reason of Petitioners' bad faith, vexatious and abusive conduct during the proceedings.

STATEMENT OF THE CASE

This controversy arises from the bankruptcy proceeding of Georgia Paneling Supply, Inc. (the "Bankrupt"), which, though a no-asset case, has been pending in the Northern District of Georgia since July 29, 1974. (Vol. I, R-123). The corporate Petitioners hold unsecured claims against the Bankrupt for goods sold on credit. (Vol. II, R-307-331). The individual Petitioner, W. Kent Bishop, is the attorney for the corporate Petitioners. Respondent John C. Pennington is the bankruptcy trustee ("Trustee") for the Bankrupt and was elected to that position by Petitioners. (Vol. I, R-123). Respondent Freeman & Hawkins is a law partnership that formerly served as the Trustee's counsel. Respondent Aetna Business Credit, Inc. ("Aetna") is a commercial finance company, which, during 1973 and 1974, financed the accounts receivable and inventory of the Bankrupt.

In July of 1975, Petitioners persuaded the Trustee to sue Aetna and the C&S Bank ("C&S") to recover the value of certain of the Bankrupt's property upon which Aetna and C&S had foreclosed their respective security interests. (Vol I, R-124). The theory of recovery was that Aetna and C&S had received voidable transfers under the bankruptcy laws as the result of their foreclosures. After reviewing the findings of a private in-

vestigator whom he had retained to develop the evidentiary support for his complaint, the Trustee determined that his claim against Aetna was not meritorious. (Vol. I, R-124-125). Accordingly, the Trustee agreed to dismiss his claim against Aetna for his costs ($350) and requested the Bankruptcy Court to permit him to settle on that basis, leaving him free to pursue what he felt was a meritorious claim against C&S. (Vol. I, R-124-125).

Despite the vigorous objections of Petitioners, the Bankruptcy Court after a hearing approved the proposed settlement on June 16, 1976, and denied the Petitioners' request to remove the Trustee from office for proposing the settlement. (Vol. I, R-125; *see* Petitioners' Joint Appendix at 66). On appeal the District Court affirmed the Bankruptcy Court's approval of the settlement. (Vol. III, R-125). However, by a separate order, the District Court permitted Petitioners to intervene into the Trustee's lawsuit to assert their own claims against Aetna and C&S.

After the District Court's approval of the settlement, Petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure which requested that the settlement be nullified on the basis of alleged newly-discovered evidence. (Vol. I, R-126). The alleged newly-discovered evidence demonstrated, they argued, that Aetna never made a loan to the Bankrupt and therefore foreclosed upon the wrong company. Shortly before the hearing scheduled on their Rule 60(b) motion, Petitioners requested the Bankruptcy Court to continue the hearing for 35 days, to prohibit counsel for Aetna from participating at the hearing, to "incorporate by reference" as evidence in the hearing all discovery taken

in the Trustee's lawsuit and to set aside "two to three weeks" of the Court's calendar to devote to the hearing. (Vol. I, R-139). The Bankruptcy Court denied these several requests of Petitioners (Vol I, R-139), who on the morning of the hearing filed with the District Court a notice of appeal and request for immediate review (Vol. I, R-141) and filed with the Bankruptcy Court a motion for a stay of the hearing and for a reassignment of the case to another bankruptcy judge who could set aside two weeks of his calendar for the hearing. (Vol. I, R-141). The Bankruptcy Court denied Petitioners' motion and the District Court denied Petitioners' appeal as "without merit" and "frivolous". (Vol. I, R-141). Following a two-day hearing on Petitioners' Rule 60(b) motion and the submission of documentary evidence (Vol. I, R-141), the Bankruptcy Court on December 20, 1977, denied their motion and the District Court affirmed that denial on appeal. (Vol. I, R-127).

Respondents thereafter applied to the Bankruptcy Court for an assessment of legal expenses incurred by them on the grounds that Petitioners' efforts to frustrate the $350 settlement were in bad faith, vexatious and frivolous. After a hearing that occurred over a six-day period (Vol. I, R-121), the Bankruptcy Court entered an order assessing Petitioners the sum of $5,146.30 in favor of Aetna. (Vol. I, R-220). On August 30, 1978, the District Court affirmed the assessment (Vol. I, R-159) and thereafter reaffirmed its decision upon Petitioners' motion for reconsideration. The Bankruptcy Court entered detailed findings of Petitioners' misconduct, which, among other things, consisted of their having willfully misrepresented as newly-discovered certain evidence that they had had for almost two years; having asserted legal positions as supported by authority when

such positions were contrary to well-settled authority; having frivolously appealed from every interlocutory and final order entered in the case, including an appeal to the Court of Appeals of an order assessing $131.50 of transcript costs against them (Vol I, R-126), which was peremptorily dismissed (Vol. I, R-127); having refused to adhere to verbal instructions from the Bankruptcy Court during hearings; and having taken contradictory factual positions in their Rule 60(b) motion (*e.g.*, Aetna never loaned money to the Bankrupt) and in their subsequently filed intervenors' complaint in the Trustee's lawsuit (*e.g.*, Aetna did advance money to the Bankrupt).

REASONS FOR DENYING THE WRIT

I. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Bankruptcy Court, the District Court and the Court of Appeals fully considered the issues raised in the instant Petition. The judgment of the Bankruptcy Court was entered after a hearing that consumed the better part of six days (Vol. I, R-121) and was affirmed on appeal by the District Court, which reaffirmed its decision upon Petitioners' request for reconsideration. (Vol. I, R-159, R-34). The Court of Appeals for the Fifth Circuit, after a full briefing of the issues and oral argument, affirmed the judgments below on May 9, 1980, and denied Petitioners' petition for reconsideration on June 3, 1980.

The courts below correctly decided the issues. Although counsel fees are generally not awarded to a prevailing party absent a statute, court rule or contract making provision for such an award, *see Alyeska Pipe-*

line Service Co. v. Wilderness Society, 421 U.S. 240 (1975), an assessment of such fees is appropriate against a losing party who during the course of a proceeding has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." *F. D. Rich Co., Inc. v. United States,* 417 U.S. 116, 129 (1974); *Hall v. Cole,* 412 U.S. 1, 5 (1973); *In re A. G. Love,* 577 F.2d 344 (5th Cir. 1978). Moreover, a federal court has the inherent power to assess such fees against an attorney for a litigant who has willfully abused the judicial process. *See Roadway Express, Inc. v. Piper,* 65 L. Ed. 2d 488 (1980); *Browning Debenture Holder's Committee v. DASA Corp.,* 560 F.2d 1078 (2d Cir. 1977); *Suel v. Addington,* 465 F.2d 889 (9th Cir. 1972). The applicability of this so-called "bad faith" exception to the general rule rests largely within the discretion of the court based upon the facts of the particular case and will not be overturned unless clear abuse of such discretion is shown. *See In re A. G. Love,* 577 F.2d 344 (5th Cir. 1978); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.,* 441 F.2d 631 (5th Cir.), *cert. denied,* 404 U S. 941, *reh. denied,* 404 U.S. 996 (1971). In the instant case the Bankruptcy Court and the District Court expressly found, and the Court of Appeals affirmed, that Petitioners had acted in bad faith during the course of this proceeding and had repeatedly abused the judicial process.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

Petitioners have alleged the existence of, but have failed to provide any citations demonstrating, a conflict among the Courts of Appeals. The Courts of Appeals have uniformly recognized that attorney's fees may be assessed against a party who proceeds in bad faith during

litigation. *E.g., In re Newport Harbor Associates,* 589 F.2d 20 (1st Cir. 1978); *Richardson v. Communications Workers of America,* 530 F.2d 126 (8th Cir. 1976); *Carter v. Noble,* 526 F.2d 677 (5th Cir. 1976); *Acevedo v. Immigration and Naturalization Service,* 528 F.2d 918 (2d Cir. 1976); *Lowe v. Willacy,* 239 F.2d 179 (9th Cir. 1956). Moreover, attorney's fees have frequently been assessed against a party and his counsel for vexatious and frivolous actions in bankruptcy cases. *E.g., In re Newport Harbor Associates,* 589 F.2d 20 (1st Cir. 1978); *In re A. G. Love,* 579 F.2d 344 (5th Cir. 1978); *In re Boston & Providence Railroad Corp.,* 501 F.2d 545 (1st Cir. 1974); *In re Midland United Co.,* 141 F.2d 692 (3rd Cir. 1944); *In re Swartz,* 130 F.2d 229 (7th Cir. 1942); *In re Truman Bright,* 3 Bankr. Ct. Dec. 881 (E. D. Pa. 1977) (King, B. J.). Furthermore, this Court recently ruled in *Roadway Express, Inc. v. Piper, supra,* that a federal court has the inherent power to assess attorney's fees against a party and his attorney for abusive and bad faith conduct in the course of litigation, thus resolving any purported conflict that ever may have existed among the Courts of Appeals.

III. ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED

The decision below turns upon its own facts and will affect no persons other than the litigants. Petitioners characterize the specific instances of bad faith recited in the findings of fact below as their "naivete or missteps unmixed with bad faith." However, both the District Court and the Court of Appeals affirmed the Bankruptcy Court's findings of Petitioners' bad faith after a full briefing and oral argument of the issues. A review by this Court of the transcripts, pleadings, depo-

sitions and multiplicity of appeals filed by Petitioners will clearly reveal that the decisions below are amply supported by the extensive record in this case.

IV. NO JUDICIAL MISCONDUCT OCCURRED BELOW

Petitioners dwell at length upon what they claim to be evidence of misconduct by the Bankruptcy Judge, the District Court Judge and counsel for Respondents, who purportedly conspired together to deprive Petitioners of a fair hearing and to defeat their Rule 60(b) motion.

The first act of misconduct alleged by Petitioners is that the Bankruptcy Judge, The District Court Judge and counsel for Respondents engaged in *ex parte* conferences concerning the Rule 60(b) motion. There is nothing in the record to support such an assertion, Petitioners have produced no evidence to that effect, and Respondents deny that such was the case. After he entered his order denying Petitioners' Rule 60(b) motion, the Bankruptcy Judge directed counsel for Respondents to prepare and submit to him proposed findings of fact and conclusions of law. Without further discussion of the matter, Respondents prepared the proposed findings (which assumed as true the factual assertions of Petitioners), submitted them to the Bankruptcy Judge's secretary, and later received them back from the Bankruptcy Judge in edited form. Such a procedure is not only a common practice in the bankruptcy courts of this State, but also is expressly provided for by Rule 91.8 of the Local Rules of the Northern District of Georgia. Contrary to Petitioners' implication that these facts were concealed from the courts below, Petitioners' allegations

have been fully addressed in the briefs and at oral argument before the Fifth Circuit.

The second act of misconduct alleged is that the Bankruptcy Judge and the Trustee had "breakfast" together prior to the Rule 60(b) hearing. As the Trustee testified in a deposition taken by Petitioners, the Bankruptcy Judge, who was unaware that the Rule 60(b) motion was scheduled for hearing later that day, was having coffee at a diner across the street from the court house and, when the Trustee entered, invited him to sit at his table. The Trustee straightaway reminded the Bankruptcy Judge that he was involved in a matter before him that day and, after exchanging a few social remarks, the two parted company without ever having once discussed any aspect of the case. A representative of one of the Petitioners, who happened to be sitting at a table next to the Bankruptcy Judge and who overheard their conversation, reported this chance encounter to Petitioners' counsel, who did not ever mention the matter until several months later at the hearing to assess Petitioners with attorney's fees for their bad faith and frivolous litigation. Apart from the fact of this coincidental encounter, Petitioners have never once asserted that anything was ever said between the Bankruptcy Judge and the Trustee about the hearing, and the Trustee has under oath denied that any such discussions were had. The mere fact of this encounter is neither indicative of collusion nor a basis for judicial disqualification. *See, e.g., United States v. Mitchell,* 377 F. Supp. 1312 (D.D.C. 1974), *aff'd* 559 F.2d 31 (D. C. Cir. 1976), *cert. denied* 431 U.S. 933 (1977) (judicial disqualification was not required where judge's picture having dinner with special prosecutor had been published in newspaper which re-

ported that judge and prosecutor had "bantered" about the case).

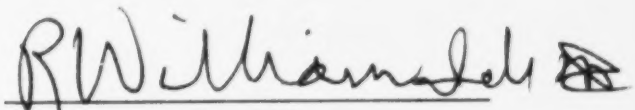
V. PETITIONERS SEEK TO RAISE AN ISSUE NOT RAISED BELOW

Petitioners argue that the assessment of fees against them was tantamount to finding them in criminal contempt of court and that they were therefore entitled to a jury trial. Apart from the fact that they did not raise the absence of a jury trial as a question for review by the Court of Appeals, Petitioners never once requested a trial by jury. Accordingly, they are barred from raising this issue now.

CONCLUSION

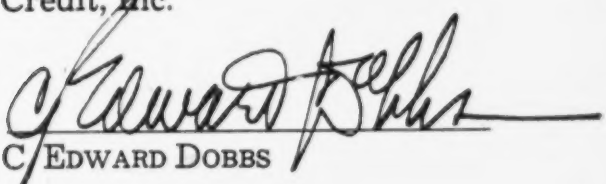
For the reasons stated above, it is respectfully submitted that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,



R. WILLIAM IDE, III

Counsel of Record for
Respondent Aetna Business
Credit, Inc.



C. EDWARD DOBBS

Counsel for Respondent
Aetna Business Credit, Inc.

KUTAK ROCK & HUIE
1200 Standard Federal
Savings Building
Atlanta, Georgia 30303
(404) 522-8700

AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

R. William Ide, III, being first duly sworn, deposes and says that he served three copies of the foregoing Brief upon counsel for Petitioners and three copies of said Brief upon counsel for Respondents John C. Pennington and Freeman & Hawkins by depositing same in the United States Mail, with first class postage prepaid, addressed as follows:

W. KENT BISHOP, ESQ.
1835 First National Bank Tower
Two Peachtree Street, N. W.
Atlanta, Georgia 30303

DOUGLAS L. CRONKRIGHT, ESQ.
233 Peachtree Street,
Harris Tower
Atlanta, Georgia 30303

This 6 day of October, 1980.

R. WILLIAM IDE, III

Sworn to and subscribed
before me, this 6 day of
October, 1980.

NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission expires August 10, 1981